U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 18May2001

CASE NO.: 2000-DCW-0012
OWCP NO.: 40-107222

IN THE MATTER OF:

Mae Frances Johnson
Claimant

v.

Greater S.E. Community Hospital
Employer/Self-Insurer

and

Hartford Insurance Company
Carrier

APPEARANCES:

Pro Se
For the Claimant

Ann Wittik-Bravmann, Esq.
For the Employer/Self-Insurer

BEFORE: DAVID W. DI NARDI
Administrative Law Judge

DECISION AND ORDER - AWARDING MEDICAL BENEFITS

This is a claim for worker's compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. §901, **et seq.**), as extended by the provisions of the D.C. Workers' Compensation Statute, 36 D.C. Code 501, **et seq.**, herein jointly referred to as the "Act." The hearing was held on December 6, 2000 in Washington, D.C., at which time all parties were given the opportunity to present evidence and oral arguments. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administration Law Judge, CX for a Claimant's exhibit, and EX for an Employer's exhibit. This decision is being rendered after having given full consideration to the entire record.

Post-hearing evidence has been admitted as:

Exhibit No.	Item	Filing Date
CX 14	Claimant's supplemental medical reports	12/20/00
EX 13A	Respondents' letter filing additional evidence on behalf of the Respondent	12/29/00
EX 13	Record of payments made by Hartford for treatment received by Ms. Johnson from August 21, 1996 to August 21, 1997.	12/29/00
EX 14	Correspondence from Ms. Johnson to the Hartford from May 28, 1998 to November 6, 2000	12/29/00
EX 15	Correspondence from the Hartford to Ms. Johnson dated June 28, 1999 to August 9, 1999	12/29/00
EX 16	Dr. Dennis' addendum dated December 27, 2000	12/29/00
EX 17	Employer's brief	02/02/01
CX 15	Claimant's additional medical records[1]	02/12/01

The record was closed on February 12, 2001, as no further documents were filed.

Stipulations and Issues

The parties stipulate, and I find:

1. The Act applies to this proceeding.

2. Claimant and Employer were in an employee-employer relationship at the relevant times.

[1]Copies of CX 14 and CX 15 were sent by Claimant to the Carrier and counsel.

3. On September 2, 1976, Claimant suffered an injury in the course and scope of her covered employment.

4. Claimant gave the Employer notice of the injury in a timely fashion.

5. Claimant filed a timely claim for compensation and the Employer filed a timely notice of controversion.

6. The Employer voluntarily and without an award has paid certain compensation benefits to the Claimant and her claim was resolved, pursuant to Section 8(i) of the Act, on September 20, 1985, at which time Deputy Commissioner Janice V. Bryant approved the settlement agreement. (CX 2)

The unresolved issue in this proceeding is Claimant's entitlement to ongoing medical treatment for her work-related injury.

Summary of the Evidence

As noted above, the parties resolved the compensation aspects of this claim by a settlement agreement, pursuant to Section 8(i) of the Act, and, to put this matter in proper perspective, I shall now refer to the agreement itself (CX 2):

"This is a joint petition by the parties in the above-captioned matter for approval of an agreed settlement, pursuant to Section 8(i) of the Longshoremen's and Harbor Workers' Act and Implementation Regulation 702.243. In support of said application, the parties rely on the following facts.

1. On September 2, 1976, the Claimant, Mae Johnson, sustained an injury to her back while in the course of her employment with the Greater Southeast Community Hospital.

2. At the time of the injury, the Employer was insured by the Hartford Insurance Company.

3. The Claimant's average weekly wage at the time of her injury was $153.16, thus entitling her to temporary total disability benefits at the rate of $102.10 per week.

4. The Employer and insurance carrier provided the Claimant with medical care and paid all temporary total disability benefits owed to the Claimant for various periods between September 6, 1976 and September 13, 1983. The Employer/Carrier has also paid the Claimant temporary partial benefits from September 14, 1983 through and including August 20, 1985.

5. There is a present dispute between the parties concerning the Claimant's eligibility for continuing temporary total, temporary partial and/or permanent partial disability benefits. The Claimant acknowledges that she would have difficulty proving her claim for continuing disability benefits as a result of her September 2, 1976 injury.

6. Concerning all of the circumstances outlined above, the Claimant, after consulting with her attorney, Patrick M. Regan, of the law firm of Koonz, McKenney & Johnson, P.C., has agreed to accept from the Employer and Carrier a lump sum payment of $20,000.00 in settlement of her claim for all compensation benefits. This lump sum payment is in addition to benefits for temporary total and temporary partial disability previously paid to the Claimant.

7. The parties further agree that this settlement is being made without prejudice to the Claimant's right to receive medical attention for treatment which is causally related to her injury of September 2, 1976.

8. The Claimant, with the advice of her counsel, believes that this agreed settlement in light of her acknowledged difficulty in proving her eligibility for continuing benefits is in her best interest and should be approved.

9. The Claimant has been fully aware of her rights under the Act and is fully aware that the approval of the above settlement will discharge the Employer from any further liability in this case, with the exception of the Claimant's right to receive medical benefits as referred to in paragraph 7 above.

10. Counsel has represented the Claimant continuously and has advised her with regard to her case. In addition, counsel has continuously reviewed this file from a legal and medical standpoint and has engaged in considerable negotiations with the Employer and insurance carrier in an effort to arrive at the agreed settlement.

11. Accordingly, the Claimant's counsel, Patrick M. Regan, is requesting approval of an attorney's fee in the amount of $4,000.00. The Claimant understands that said fee is to be deducted from the benefits due and agrees that the amount of the fee requested is fair and reasonable.

Accordingly, the Claimant and her counsel request approval of this settlement.

As also noted, Deputy Commissioner Janice V. Bryant approved the settlement on September 20, 1985. (CX 2)

Claimant's injury has resulted in chronic cervical and lumbar pain, beginning at the base of her skull and radiating down to her tail bone, and she testified credibly that she has experienced those symptoms since the day of her injury. She first was treated by Dr. Edward Rankin, an orthopedic surgeon, and he referred Claimant to a neurological surgeon, Dr. Earl C. Mills. The earliest report from the doctor is dated February 13, 1984 wherein the doctor states as follows (EX 8):

"Ms. Johnson continues to complain of headaches. She indicates that she has been seen by Dr. Gary London, a neurologist, in addition to having been seen by Dr Arthur Kobrine, a neurosurgeon, and Doctor Restack, a neurologist for the same complaint. According to Ms. Johnson, she has had a temporomandicular joint and sinus x-rays, which apparently were negative. In addition, she complains of pain in the posterior cervical and interscapular regions of the back and in the lumbosacral region of the back.

"EXAMINATION: She is alert and fully oriented. She is minimally tender throughout the posterior cervical and interscapular regions. She demonstrates no spasms either in the cervical or lumbar paravertebral areas. Passive straight leg raising bilaterally at 80 degrees produces mild lumbosacral discomfort. Patrick's test bilaterally is negative. Motor testing reveals no focal deficit. Range of motion of the lumbosacral spine is as follows: anterior flexion to 60 degrees; lateral flexion on both sides at 14 degrees; hyperextension at 7 degrees; producing minimal lumbosacral discomfort.

"IMPRESSION: Cervical degenerative disk disease. Chronic low back pain syndrome. Myofascial syndrome, cervical and lumbar regions. Cephalgia.

"RECOMMENDATION: I am referring this lady to physical therapy to the cervical and lumbar regions. I shall reevaluate her in approximately 8 weeks, or before if necessary," according to the doctor.

Dr. Mills next saw Claimant on May 31, 1984, at which time he reported as follows (EX 9):

"Ms. Johnson indicates she has had a cold for the last two weeks or so but is presently in a phase where the cold seems to be resolving. However, during this period of time every time she coughed, her headache progressively increased beyond what it has been in the past. Right now, it is confined primarily to the right frontoparietal region and it is dull to intermittently sharp. It is not associated with nausea or vomiting. She has had mild interscapular and paracervical discomfort and also pain

involving the lumbosacral region of the back radiating into the right lower extremity. She has also had mild right elbow pain.

"EXAMINATION: She is alert and fully oriented. Cranial nerves are grossly normal, including funduscopic evaluation, which reveals no evidence of hemorrhages or exudates. Full range of motion of the neck is performed. The latter is associated with mild right suprascapular discomfort. There is no spasm either in the cervical or lumbar paravertebral regions. Passive straight leg raising on the left side at 80 degrees produces mild lumbosacral discomfort. Passive straight leg raising on the right side at 65 degrees produces low back and mild right posterolateral thigh pain. Her gait is unremarkable except for mild lumbosacral discomfort.

"IMPRESSION: Cephalgia. Cervical radiculopathy on the right side. Chronic low back pain syndrome with mild right lower extremity radiculopathy. Rule out right elbow pathological process.

"RECOMMENDATION: The patient is advised to continue her household analgesics. I am referring her to Dr. Edward Rankin, an orthopedic surgeon, regarding possible pathological process of the right elbow should the latter continue. I shall reevaluate her in approximately 3 months or before if necessary.

Dr. Mills next saw Claimant on August 23, 1984, at which time the doctor reported as follows (EX 10):

"Ms Johnson indicates that she still has headaches. She continues to experience low back and right lower extremity pain. The right elbow pain she claims has resolved, and hence, has not been seen by Dr. Rankin for followup evaluation. She is still concerned, however, about her increased blood pressure.

"PHYSICAL EXAMINATION: She is alert and fully oriented. Cranial nerves are normal. She is nontender throughout the anterocervical region, and full range of motion is performed of the neck. She is minimally tender throughout the lumbar paravertebral region of the back. Passive straight leg raising bilaterally at 80 degrees produces a pulling sensation throughout the lumbar paravertebral region of the back. On the right side, there is mild posterior thigh discomfort. There is no cervical or lumbar paravertebral spasm, atrophy or fasciculation. Deep tendon reflexes are 2+ for both upper and lower extremities. Plantar stimulation is downgoing bilaterally. Anterior flexion hyperextension at 9 degrees, and lateral flexion, especially on the right side, at 12 degrees. On the left side, lateral flexion at 14 degrees produces only a pulling sensation.

"IMPRESSION: Cervical strain, chronic low back pain syndrome, with right lower extremity radiculopathy, essentially without objective evidence of worsening. Cephalgia.

"RECOMMENDATION: The patient is being referred to Dr. Barry Smith, for treatment of her hypertension. She is in no way interested in pursuing a myelogram at this particular point, but will continue conservative modalities, including Williams flexion exercises, and isotonic isometric exercises to the neck. I shall be happy to reevaluate her in approximately six weeks, or before if necessary.

According to Claimant, she has experienced very intense headaches ever since December 21, 1982, at which time she was supposed to have been administered an epidural spinal nerve block. However, something happened and, after the skin was punctured, the injection was aborted and Claimant remained seated on the hospital gurney in intense pain. The doctor wrote out a prescription and it is in evidence as CX 3.

The Employer referred Claimant for an examination by its medical expert, Dr. Michael W. Dennis, and the doctor states as follows in his March 26, 1985 report (EX 2-1):

"The patient returns for follow-up evaluation. She was last in this office on September 12, 1983. Her complaints at that time were of headaches, neck pain, low back pain and bilateral extremity pain associated with numbness of the last three fingers of both hands. When examined by my partner he was unable to define any objective abnormality. Since that time the patient has not received any specific treatment. She has not returned to any form of employment. She presents now for disability assessment. Her present complaints remain virtually unchanged. She continues to complain of headaches associated with neck pain, bilateral arm pain, bilateral numbness of the fourth and fifth digits of the hands, low back pain radiating into the left leg.

"EXAMINATION: The patient presents as a well developed, well nourished female in no acute distress. Exam of the neck reveals full range of motion of the cervical spine in forward flexion, hyperextension and right and left lateral rotation. There is no evidence of paravertebral muscle spasm. Exam of the back reveals preservation of the normal lordotic curve. Forward flexion and hyperextension are full. On forward bending the patient does complain of pain involving the right sacroilliac region. Cranila nerves 2-12 are intact. The patient exhibits no nysragmus. The patient exhibits no sensory, motor or reflex asymmetries of the upper or lower extremities except for a relative sensory deficit involving both fifth digits. There are

no pathologic reflexes.

"COMMENT: At the present time I am unable to define any objective abnormalities. Based on the present physical findings, I would have to conclude that there is no disability rating referable to the work incurred injuries that the patient has received. On the basis of her present physical findings, the patient does not need any ongoing treatment."

Claimant credibly testified that she received additional treatment from the doctors in 1986 and 1987, and that she also had courses of physical therapy at the Employer's hospital. Moreover, she credibly testified that she asked the Hartford Insurance Company numerous times for authorization of and payment for the prescribed physical therapy, that the company would not answer her letters, would not approve the therapy and that in all these years the company has sent her one letter, and that was on August 9, 1999, and that letter (CX 1) will be discussed below. (TR 19-87; CX 14, CX 15)

Claimant did undergo emergency coronary artery bypass surgery on June 25, 1993 and apparently there ensued a complication in the form of a left leg infection, and that problem was surgically corrected in November of that year. (EX 3, EX 4)

The next medical report in this closed file is the March 6, 1996 report of Dr. Joseph Liberman, a specialist in clinical neurology, wherein the doctor states as follows (EX 5):

"I saw Mae Johnson for initial neurologic evaluation on March 6, 1996. At that time, this 53 year old woman was complaining of pain in the left inner thigh to the buttock. She said sitting makes the pain worse. She reports having numbness in the left buttock and left posterior thigh. Her symptoms started in 1993. She had a triple bypass surgery of her heart and had a vein removed from her left leg. Five months after the surgery the leg became infected. Apparently something has not been removed that should have been removed at the time of the surgery. When it became infected she awoke with her leg swollen and purple. She has had this problem with pain in the left inner thigh to the buttock every since that infection in 1993.

"She also has a history of chronic low back pain. On February 12, 1996 she had an EMG and nerve conduction study and was diagnosed as having a herniated lumbar disc. She suffers with constant low back pain. She has had some problem with her low back since 1976. She has occasional right leg pain as well.

"Past medical history includes a history of being a diabetic and having been hospitalized because of a problem with her toes on

the right foot. She also takes Coumadin and Captopril. She also takes Zocor. She has no known allergies. Review of systems is otherwise noncontributory.

"On neurologic exam, motor strength was good in both lower extremities. Reflexes were hard to elicit in both lower extremities. Sensation to pin prick was intact in both lower extremities. There was moderate tenderness over the lumbar spine and some decreased range of motion of the lumbar spine. Straight leg raising was positive at about 45 degrees bilaterally. Her gait was reasonably good. She was tender over the left inner thigh and buttock.

"IMPRESSION: 1. Left thigh and buttock pain.
2. Low back pain.
3. Diabetes.

"COMMENT: Since this left inner thigh pain started when she had the infection in her left leg I suspect there is some irritation of the tissues or even a nerve from scar tissue secondary to infection. I don't believe it is directly related to her lower back problem. I don't think there is any simple or easy way to get rid of this pain in her left inner thigh. I did recommend that she might want to try a TENS unit to see if that will suppress the discomfort in the left inner thigh. She could also try medications such as Tegretol or Amitriptyline to, again, diminish the discomfort in the left thigh. These medications, if they are helpful, would only result in temporary improvement. I discussed with her the value of weight loss in controlling her diabetes. However, I don't believe this will be helpful for either her lower back or her left thigh problem. Should her symptoms get worse or she would like to try one of these treatments she will contact me," according to the doctor.

Dr. Liberman next saw Claimant on November 6, 1996, at which time the doctor reported (EX 5 at 3):

"I saw Mae Johnson for a neurological evaluation in my office on November 6, 1996. At that time, this 54 year old woman reported no improvement in her constant and chronic low back pain. She says she gets intermittent numbness in both legs. Any strenuous activity makes her pain worse and often she has to stay in bed for the next day if she has done anything strenuous. She is diabetic and takes Insulin since 1993.

"On examination, she was tender over the bilateral SI joints and over the left flank. Motor strength was good in both lower extremities. Reflexes were hard to elicit in both lower extremities. She was able to flex forward about 25 degrees and extend backwards about 10 degrees. She had about 10 degrees lateral flexion bilaterally.

“IMPRESSION: Chronic low back pain.

“COMMENT: She said that physical therapy had not helped her in the past. I had a long discussion with her about diet and weight loss. I recommended a book for weight loss program. I think this might help her back pain to a slight degree. I think it would probably also help her diabetes and high blood pressure. No prescriptions were written at this time. She will return in a few months time for re-evaluation.”

“CHIEF COMPLAINT: Severe neck and severe low back and bilateral lower extremity pain, bilateral upper extremity pain.

“HISTORY OF THE PRESENT ILLNESS: Mrs. Johnson is a patient who was evaluated by me in the 1980s. She was last seen in this office on 8-23-84. Since that time she has undergone a triple bypass coronary surgery by Dr. Louis Kanda. She suffers from diabetes and is on Insulin Humulin 70/30 28 units qam and 10 units qhs. She is also on Coumadin 5mg and Captopril 12.5mg tid and one other medication. The patient comes in today complaining that she has had ongoing pain in her low back with radicular component into both lower extremities. She still has ongoing pain in her neck with numbness affecting both upper extremities. She has difficulty reaching. Her pain is worse on the right side. She has been seen recently by Dr. Joseph Liberman who has referred her for physical therapy and has ordered a TENS unit to be utilized. According to the patient, since 1984 to the present, she has had no active formal treatment for her ongoing pain involving the cervical and lumbar regions. She has had no further headaches. The latter have been fully resolved.

“EXAMINATION: She is alert and fully oriented. She is moderately tender on palpation throughout the cervical and lumbosacral regions. No spasm is noted either in the cervical or lumbar regions. Foramen closure testing on the left is associated with left paracervical pain. In the lumbar region, anterior flexion is accomplished to 55 degrees. Lateral flexion on both sides, 13 degrees. Hyperextension at 8 degrees produces pain throughout her low back region. Passive straight leg raising bilaterally is associated with complaint of severe low back pain. There is no evidence of muscle atrophy or fasciculations involving either the cervical or lumbar regions.

“IMPRESSION: Cervical sprain.
Chronic severe low back pain syndrome.
Cervical radiculopathy.

“DISCUSSION: This patient’s symptomatology has been quite prominent. Her examination reflects an ongoing chronic

situation affecting both the cervical and lumbar regions for which indeed she is in urgent need of physical therapeutic modalities both the cervical and lumbosacral regions, among which a TENS unit would be most appropriate. It is quite likely that she may even require a lumbar epidural block series or even trigger point injections to the cervical region. The patient will be followed by Dr. Lieberman on an ongoing basis."

Dr. Mills sent the appropriate health insurance claim form to the insurance company, the doctor indicating that the treatment was related to the September 2, 1976 injury. (CX 5)

Dr. Dennis re-examined Claimant on October 2, 2000 at the Employer's request and the doctor states as follows in his Neurosurgical Evaluation (EX 2 at 2-3):

"CHIEF COMPLAINT: Neck and back pain.

"HISTORY: This 58 year-old female fell at work in September of 1976 sustaining injury to her neck and back. She was initially evaluated by Dr. Rankin and then came under the care of Dr. Mills and subsequently Dr. Liberman. She at present is under the care of Dr. Liberman. Since the injury she has had periodic flare-ups of her neck and back pain and has undergone episodic physical therapy for treatment of her complaints. She has had a recent flare-up of her neck and back pain and Dr. Liberman is recommending additional physical therapy. The patient presents now to ascertain the relationship of her present subjective complaints to her injury occurring in 1976. At present, she complains of pain involving the entire spine from the base of the skull to the low back region. The pain radiates into both arms in addition to the legs. She does have numbness and tingling in the hands but none in the lower extremities. She has not worked since 1982. The patient denies any bladder or bowel symptoms. Past medical history is remarkable in that the patient is a known diabetic. She takes insulin 28 units in the morning and 10 units at night. She has undergone coronary triple bypass in 1993. She is taking at present, Lipitor and Captopril for treatment of high blood pressure. There are no known drug allergies.

"PHYSICAL EXAMINATION: The patient presents as a well-developed, well-nourished female in no acute distress. Examination of the neck reveals full range of motion of the neck in forward flexion, hyperextension is limited 20 degrees and right and left lateral rotation are unrestricted. Examination of the low back reveals preservation of the normal lordotic curve. Forward flexion is limited by 10 degrees. Hyperextension can be accomplished to 20 degrees. Seated straight-leg raising test is negative. The patient otherwise exhibits no sensory, motor or reflex impairments. Jugular

compression test is negative.

"REVIEW OF RECORDS: A series of medical records are submitted. They all basically (are) from 1993 forward starting with the records of Dr. Conda when he hospitalized the patient for a triple bypass procedure. The report of Dr. Conda would suggest an acute flare-up of her symptoms but basically there is no record to relate this to her accident in 1976 other than the patient's subjective complaint.

"IMPRESSION: The patient at the present time has what appears to be mechanical problems with reference to her neck and back. It would certainly not be unreasonable to treat the patient with episodic physical therapy. In terms of relating the patient's subjective complaints to the injury sustained in 1976, the medical records that I have are simply not sufficient enough to establish a relationship between the 1976 injury and her current complaints. I would certainly need to have information indicating periodic flare-ups dating from the date of the injury in order to relate the present problems back to the 1976 injury," according to the doctor, who reiterated his opinions in his December 27, 2000 supplemental report. (EX 16)

The Employer has also referred Claimant for an examination by Dr. John B. Cohen on November 3, 2000 and the doctor, who is a Board-Certified orthopedic surgeon, stated as follows in his report (EX 7):

"CHIEF COMPLAINT: Pain radiating from the base of scalp to the tailbone with pain in all four extremities 'all the time.'

"HISTORY OF PRESENT ILLNESS: The patient is a 58-year-old black female who states she fell on a wet floor while working in the radiology department at Greater Southeast Community Hospital on 09/02/76. She was initially seen in the hospital where she had X-rays. She followed up originally with Dr. Anthony (sic?) Rankin and later followed up with Dr. Earl Nelson and Dr. William MikeFord. She has now been seeing a neurologist, Dr. Joseph Liberman since 1996. She last saw Dr. Liberman in either January or February of this year. Her next visit is not scheduled. She also saw Alfred Pavot for what seems to be an EMG/NCV. She takes no medications at this time. She states she has not had any diagnostic test such as an MRI scan. She states she stopped working in 1982 secondary to the injury and that the case was settled in 1985. She denies any history of numbness or tingling in any extremity. She denies any history of motor weakness. She denies any history of bowel or bladder problem.

"PAST MEDICAL HISTORY: Hypertension treated by Dr. Robinson. She takes one unknown medicine q.d. She also has a history of diabetes treated with insulin. Humulin 70/30, dose 28 units

subeu q.a.m. and 10 units subeu p.m. She is status post CABG in 1993. She also takes Lipitor 20 mg p.o.q.d., Ecotrin 325 mg p.o.q.d. and Prempro.

“SOCIAL HISTORY: Single. She lives with a friend.

“ALLERGIES: None known.

“REVIEW OF SYSTEMS: This is a well-developed, well-nourished black female who is 5'4" tall and weighs 195 lb. She walks well. She is able to dress and undress herself without difficulty. In the sitting position, examination of the upper extremities show that she complains of mild pain over the trapezius with range of motion of the left shoulder and with cervical rotation. She has full range of motion of both shoulders. She has some loss of cervical flexion to approximately 45 degrees with complaints of pain. She can extend to 10 degrees. She has left and right lateral rotation at least to 45 degrees. Neurologically, the upper extremity is intact. She has normal sensation, normal motor function and normal reflexes in the upper extremities.

In the lower extremities, she has no pain with sitting straight leg raising. Her sensory exam is normal while sitting. Her reflexes are intact. Her motor exam is normal.

In the supine position, she complains of low back pain with right hip flexion and with right hip internal and external rotation, when flexed. She also complains of mild low back pain with left hip flexion. She has full range of motion of both hips. She has negative supine straight leg raising. She starts grimacing and panting somewhat when she was asked to lie down which she did with great feigned difficulty.

In the standing position, she will only allow 30 degrees of lumbar flexion with complaints of pain. She is unable to extend to a neutral position because of complaints of pain without assistance.

She hyperextends approximately to 10 degrees and has left and right lateral bending to 20 degrees. She can stand on her heels and toes without difficulty.

X-rays in the office of the cervical spine, two views show multiple level degenerative disc disease moderate to severe in nature. X-rays in the office of her lumbar spine show mild lumbar disc disease at multiple levels. Review of her records shows that she was seen by Dr. Arthur Kobrine, a neurosurgeon on 07/06/83 complaining of headache, neck ache and low back pain. He noted that she had been treated by Dr. Earl Mills. She was felt to have a chronic lumbar strain with post spinal headaches.

She was given a prescription of Naprosyn. She was seen in February 1984 by Dr. Earl Mills, another neurosurgeon, who felt she had cervical degenerative disc disease, chronic low back pain, myofascial pain and cephalgia, **i.e.**, headaches. She saw Dr. Mills in May 1984 and was advised to continue with household analgesics. She saw Dr. William MikeFord for neurological consultation on 06/25/84 who felt that the patient had a headache disorder cause not determined, with a bilateral ulnar neuropathy. She was advised to have another EMG/NCV and it was noted that she had a previous EMG/NCV by Dr. Pavot two years prior to the visit. She also had had a CT scan of the cervical spine on 10/26/84. She had an EEG on 07/12/84 by Dr. MikeFord, which was normal. She continues to see Dr. Mills.

She saw Dr. Mills on 08/23/84 complaining of headaches as well as low back and right lower extremity pain and he noted that the right elbow pain that had caused her to see Dr. Rankin, had resolved. She was advised to continue on home exercise program. She saw Dr. MikeFord in September 1984 complaining of hip pain shooting over her left region. Her CT scan was described as being "essentially normal." Her EMG/NCV was felt to show an ulnar neuropathy. Her EEG was noted to be normal. She was given prescription of Ativan 1 mg t.i.d. as needed for her headache. She continued with Dr. MikeFord in 1985 and also saw Dr. Michael Dennis on 03/26/85 who noted the CT scan of the cervical spine demonstrated degenerative disc disease of moderate nature at C4-5 with a negative X-ray of the hip as well as a negative CT scan of the head. He was unable to find any objective abnormalities on this visit. She saw Dr. Dennis for followup on 03/26/85. She saw Dr. Joseph Liberman on 09/24/97, which was evidently the first visit. She was felt to have chronic low back and left hip pain with recent exacerbation. He recommended that she undergo an MRI scan of the lumbosacral spine and advised to return for followup. She had previously seen Dr. Gary London, another neurologist on 10/05/83, who felt she had a left front temporal headache as described with undetermined etiology.

"PLAN: At this time I have no records available from Dr. Liberman after his note of September 1997. I do not have any records regarding her initial treatment. To answer the question for this patient, she suffered a minor injury in 1976. She was able to work for six years, she states, before she stopped work. Her pain complaints are completely subjective and not supported by her objective findings. Her X-rays are consistent with pre-existing multiple level degenerative disc disease especially of the cervical spine. I see no reason for further physical therapy that would be related to 1976 injury, which occurred 24 years ago. It is clear that she has a pre-existing degenerative disorder as seen in the CT scan report. She has reached maximum medical improvement and whatever injury she did suffer as a

result of slip and fall had long ago resolved," according to the doctor.

As noted, Claimant seeks authorization for the physical therapy modalities prescribed by Dr. Mills and Dr. Liberman and she credibly testified that she has been asking the Employer and its insurance company for these services for many years but these requests have been consistently ignored and denied. (TR 11-18)

On the other hand, the Employer submits that Claimant has not requested such treatment, that her current condition is not causally related to her injury of well over 24 years ago and that such treatment is not reasonable and necessary but simply is palliative. (TR 17-19) The Employer's counsel reiterates her position in her post-hearing brief. (EX 13)

On the basis of the totality of this record and having observed the demeanor and heard the testimony of a most credible Claimant, I make the following:

Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, **supra**, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers' Compensation Programs, U.S. Department of Labor, 455 U.S. 608, 102 S.Ct. 1318 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kelaita**, **supra**; **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Kier**, **supra**; **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989). Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to

determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981). In such cases, I must weigh all of the evidence relevant to the causation issue. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

The U.S. Court of Appeals for the First Circuit has considered the Employer's burden of proof in rebutting a **prima facie** claim under Section 20(a) and that Court has issued a most significant decision in **Bath Iron Works Corp. v. Director, OWCP (Shorette)**, 109 F.3d 53, 31 BRBS 19(CRT)(1st Cir. 1997).

In **Shorette**, the United States Court of Appeals for the First Circuit, in whose jurisdiction this case arises, held that an employer need not rule out any possible causal relationship between a claimant's employment and his condition in order to establish rebuttal of the Section 20(a) presumption. The court held that employer need only produce substantial evidence that the condition was not caused or aggravated by the employment. **Id.**, 109 F.3d at 56,31 BRBS at 21 (CRT); **see also Bath Iron Works Corp. v. Director, OWCP [Hartford]**, 137 F.3d 673, 32 BRBS 45 (CRT)(1st Cir. 1998). The court held that requiring an employer to rule out any possible connection between the injury and the employment goes beyond the statutory language presuming the compensability of the claim "in the absence of substantial evidence to the contrary." 33 U.S.C. §920(a). **See Shorette,** 109 F.3d at 56, 31 BRBS at 21 (CRT). The "ruling out" standard was recently addressed and rejected by the Court of Appeals for the Fifth and Seventh Circuits as well. **Conoco, Inc. v. Director, OWCP [Prewitt]**, 194 F.3d 684, 33 BRBS 187(CRT)(5th Cir. 1999); **American Grain Trimmers, Inc. v. OWCP**, 181 F.3d 810, 33 BRBS 71(CRT)(7th Cir. 1999); **see also O'Kelley v. Dep't of the Army/NAF**, 34 BRBS 39 (2000); **but see Brown v. Jacksonville Shipyards, Inc.**, 893 F.2d 294, 23 BRBS 22 (CRT)(11th Cir. 1990) (affirming the finding that the Section 20(a) presumption was not rebutted because no physician expressed an opinion "ruling out the possibility" of a causal relationship between the injury and the work).

To establish a **prima facie** case for invocation of the Section 20(a) presumption, claimant must prove that (1) he suffered a harm, and (2) an accident occurred or working conditions existed which could have caused the harm. **See**, **e.g.**, **Noble Drilling Company v. Drake**, 795 F.2d 478, 19 BRBS 6 (CRT) (5th Cir. 1986); **James v. Pate Stevedoring Co.**, 22 BRBS 271 (1989). If claimant's employment aggravates a non-work-related, underlying disease so as to produce incapacitating symptoms, the resulting disability is compensable. **See Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986); **Gardner v. Bath Iron Works**

Corp., 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). If employer presents substantial evidence sufficient to sever the connection between claimant's harm and his employment, the presumption no longer controls, and the issue of causation must be resolved on the whole body of proof. **See**, **e.g.**, **Leone v. Sealand Terminal Corp.**, 19 BRBS 100 (1986).

Employer contends that Claimant did not establish a **prima facie** case of causation and her need for ongoing medical treatment at this time and, in the alternative, that there is substantial evidence of record to rebut the Section 20(a), 33 U.S.C. §920(a), presumption. I reject both contentions. The Board has held that credible complaints of subjective symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case for Section 20(a) invocation. **See Sylvester v. Bethlehem Steel Corp.**, 14 BRBS 234, 236 (1981), **aff'd**, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982). Moreover, I may properly rely on Claimant's statements to establish that she experienced a work-related harm, and as it is undisputed that a work accident occurred which could have caused the need for her medical care, the Section 20(a) presumption is invoked in this case. **See**, **e.g.**, **Sinclair v. United Food and Commercial Workers**, 23 BRBS 148, 151 (1989). Moreover, Employer's general contention that the clear weight of the record evidence establishes rebuttal of the pre-presumption is not sufficient to rebut the presumption. **See generally Miffleton v. Briggs Ice Cream Co.**, 12 BRBS 445 (1980).

The presumption of causation can be rebutted only by "substantial evidence to the contrary" offered by the employer. 33 U.S.C. § 920. What this requirement means is that the employer must offer evidence which negates connection between the alleged event and the alleged harm. In **Caudill v. Sea Tac Alaska Shipbuilding**, 25 BRBS 92 (1991), the carrier offered a medical expert who testified that an employment injury did not "play a significant role" in contributing to the back trouble at issue in this case. The Board held such evidence insufficient as a matter of law to rebut the presumption because the testimony did not completely rule out the role of the employment injury in contributing to the back injury. **See also Cairns v. Matson Terminals, Inc.**, 21 BRBS 299 (1988) (medical expert opinion which did entirely attribute the employee's condition to non-work-related factors was nonetheless insufficient to rebut the presumption where the expert equivocated somewhat on causation elsewhere in his testimony). Where the employer/carrier can offer testimony which completely severs the causal link, the presumption is rebutted. **See Phillips v. Newport News Shipbuilding & Dry Dock Co.**, 22 BRBS 94 (1988) (medical testimony that claimant's pulmonary problems are

consistent with cigarette smoking rather than asbestos exposure sufficient to rebut the presumption).

For the most part only medical testimony can rebut the Section 20(a) presumption. **But see Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989) (holding that asbestosis causation was not established where the employer demonstrated that 99% of its asbestos was removed prior to the claimant's employment while the remaining 1% was in an area far removed from the claimant and removed shortly after his employment began). Factual issues come in to play only in the employee's establishment of the **prima facie** elements of harm/possible causation and in the later factual determination once the Section 20(a) presumption passes out of the case.

Once rebutted, the presumption itself passes completely out of the case and the issue of causation is determined by examining the record "as a whole". **Holmes v. Universal Maritime Services Corp.**, 29 BRBS 18 (1995). Prior to 1994, the "true doubt" rule governed the resolution of all evidentiary disputes under the Act; where the evidence was in equipoise, all factual determinations were resolved in favor of the injured employee. **Young & Co. v. Shea**, 397 F.2d 185, 188 (5th Cir. 1968), **cert. denied,** 395 U.S. 920, 89 S. Ct. 1771 (1969). The Supreme Court held in 1994 that the "true doubt" rule violated the Administrative Procedure Act, the general statute governing all administrative bodies. **Director, OWCP v. Greenwich Collieries**, 512 U.S. 267, 114 S. Ct. 2251, 28 BRBS 43 (CRT) (1994). Accordingly, after **Greenwich Collieries** the employee bears the burden of proving causation by a preponderance of the evidence after the presumption is rebutted.

As the Employer disputes that the Section 20(a) presumption is invoked, **see Kelaita v. Triple A Machine Shop**, 13 BRBS 326 (1981), the burden shifts to employer to rebut the presumption with substantial evidence which establishes that claimant's employment did not cause, contribute to, or aggravate his condition. **See Peterson v. General Dynamics Corp.**, 25 BRBS 71 (1991), **aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor**, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), **cert. denied,** 507 U.S. 909, 113 S. Ct. 1264 (1993); **Obert v. John T. Clark and Son of Maryland,** 23 BRBS 157 (1990); **Sam v. Loffland Brothers Co.**, 19 BRBS 228 (1987). The unequivocal testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. **See Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). If an employer submits substantial countervailing evidence to sever the connection between the injury and the employment, the Section 20(a) presumption no longer controls and the issue of causation must be resolved on the whole body of

proof. **Stevens v. Tacoma Boatbuilding Co.**, 23 BRBS 191 (1990). This Administrative Law Judge, in weighing and evaluating all of the record evidence, may place greater weight on the opinions of the employee's treating physician as opposed to the opinion of an examining or consulting physician. In this regard, **see Pietrunti v. Director, OWCP**, 119 F.3d 1035, 31 BRBS 84 (CRT)(2d Cir. 1997). **See also Amos v. Director, OWCP,** 153 F.3d 1051 (9th Cir. 1998), **amended,** 164 F.3d 480, 32 BRBS 144 (CRT) (9th Cir. 1999).

In the case **sub judice**, Claimant alleges that the harm to her bodily frame, **i.e.**, her chronic cervical and lumbar pain syndrome,
resulted from her September 2, 1976 injury while working for the Employer. The Employer has introduced substantial evidence severing the connection between Claimant's need for medical treatment and Claimant's covered employment. Thus, the presumption falls out of the case, does not control the result and I shall now weigh and evaluate all of the evidence.

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. **See** 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Januszie wicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an

injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos**, **supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

As noted above, Claimant's claim for compensation benefits was settled by an agreement, pursuant to Section 8(i) of the act. (CX 2) However, Claimant's right to future medical care and treatment was expressly preserved by provision 7 thereof with the following language (CX 2 at 2):

> **The parties further agree that this settlement is being made without prejudice to the Claimant's right for treatment which is causally related to her injury of 9/2/76.** (Emphasis added)

Thus, I shall now resolve Claimant's entitlement to the medical care and treatment that she seeks.

Medical Expenses

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

In **Shahady v. Atlas Tile & Marble**, 13 BRBS 1007 (1981), **rev'd on other grounds**, 682 F.2d 968 (D.C. Cir. 1982), **cert. denied**, 459 U.S. 1146, 103 S.Ct. 786 (1983), the Benefits Review Board held that a claimant's entitlement to an initial free choice of a physician under Section 7(b) does not negate the requirement under Section 7(d) that claimant obtain employer's authorization prior to obtaining medical services. **Banks v. Bath Iron Works Corp.**, 22 BRBS 301, 307, 308 (1989); **Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.**, 15 BRBS 299 (1983); **Beynum v. Washington Metropolitan Area Transit Authority**, 14 BRBS 956 (1982). However, where a claimant has been refused treatment by the employer, he need only establish that the treatment he subsequently procures on his own initiative was necessary in order to be entitled to such treatment at the employer's expense. **Atlantic & Gulf Stevedores, Inc. v. Neuman**, 440 F.2d 908 (5th Cir. 1971); **Matthews v. Jeffboat, Inc.**, 18 BRBS at 189 (1986).

An employer's physician's determination that Claimant is fully recovered is tantamount to a refusal to provide treatment. **Slattery Associates, Inc. v. Lloyd**, 725 F.2d 780 (D.C. Cir. 1984); **Walker v. AAF Exchange Service**, 5 BRBS 500 (1977). All necessary medical expenses subsequent to employer's refusal to authorize needed care, including surgical costs and the physician's fee, are recoverable. **Roger's Terminal and Shipping Corporation v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986); **Anderson v. Todd Shipyards Corp.**, 22 BRBS 20 (1989); **Ballesteros v. Willamette Western Corp.**, 20 BRBS 184 (1988).

Section 7(d) requires that an attending physician file the appropriate report within ten days of the examination. Unless such failure is excused by the fact-finder for good cause shown in accordance with Section 7(d), claimant may not recover medical costs incurred. **Betz v. Arthur Snowden Company**, 14 BRBS 805 (1981). **See also** 20 C.F.R. §702.422. However, the employer must demonstrate actual prejudice by late delivery of the physician's report. **Roger's Terminal**, **supra**.

It is well-settled that the Act does not require that an injury be disabling for a claimant to be entitled to medical expenses; it only requires that the injury be work related. **Romeike v. Kaiser Shipyards**, 22 BRBS 57 (1989); **Winston v. Ingalls Shipbuilding**, 16 BRBS 168 (1984); **Jackson v. Ingalls Shipbuilding**, 15 BRBS 299 (1983).

On the basis of the totality of the record, I find and conclude that Claimant has shown good cause, pursuant to Section 7(d). Claimant advised the Employer of her work-related injury on the same day and requested appropriate medical care and treatment. However, while the Employer did accept the claim and

did authorize certain medical care, Claimant's requests for physical therapy and the other modalities prescribed by her doctors have consistently been ignored and/or denied. Thus, any failure by Claimant to file timely the physicians' reports are excused for good cause as a futile act and in the interests of justice as the Employer refused to accept the claim, as shall now be further discussed.

In order to put this issue in proper perspective, it is well to keep in mind certain well-settled principles of law.

Initially, I note that a claim for medical benefits is never time-barred. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 222 (1988). Employer has a continuing obligation to pay an injured employee's medical expenses, even if the claim for Section 8 compensation is time-barred by Section 12 or 13, **Strachan Shipping Co. v. Hollis**, 460 F.2d 1108 (5th Cir.), **Cert. denied**, 409 U.S. 887 (1972); **Wilson v. Southern Stevedore Co.**, 1 BRBS 123 (1974), if the employee is no longer employed by the employer, **see Todd Shipyards Corp. v. Black**, 717 F.2d 1280, 16 BRBS 13 (CRT) (9th Cir. 1983), **aff'g** 13 BRBS 682 (1981), **cert. denied**, 466 U.S. 937 (1984), or if employer is granted relief under Section 8(f).

Section 7(a) of the LHWCA provides that:

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. §907(a).

In order for a medical expense to be assessed against the employer, the expense must be both reasonable and necessary. **Parnell v. Capitol Hill Masonry**, 11 BRBS 532, 539 (1979).

Medical care must be appropriate for the injury. 20 C.F.R. §702.402. Therefore, this Administrative Law Judge may reject an award of or payment for unnecessary treatment. **Ballesteros v. Willamette W. Corp.**, 20 BRBS 184, 1987 (1988); **Turner v. Chesapeake & Potomac Tel. Co.**, 16 BRBS 255 (1984); **Scott v. C & C Lumber Co.**, 9 BRBS 815 (1978).

A claimant has established a **prima facie** case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. **Turner**, 16 BRBS at 257-58. Moreover, this Administrative Law Judge has no authority to deny a medical expense on the ground

that a physician's expertise, customary fees, or result of treatment were not documented. **Id.** at 257. Employer is only liable, however, for the reasonable value of medical services. 20 C.F.R. §702.413; **Bulone v. Universal Terminal & Stevedoring Corp.** 8 BRBS 515, 518 (1978); **Potenza v. United Terminals**, 1 BRBS 150 (1974), **aff'd**, 524 F.2d 1136, 3 BRBS 51 (2d Cir. 1975).

It is also well-settled that this Administrative Law Judge is required to make specific findings of fact regarding an employer's claim that a particular expense is non-compensable. **Monrote v. Britton**, 237 F.2d 756 (D.C. Cir. 1956). The employer must raise the reasonableness and necessity of treatment at the hearing. **Salusky v. Army Air Force Exch. Serv.**, 3 BRBS 22 (1975).

The Claimant must establish that the medical expenses are related to the compensable injury. **Pardee v. Army & Air Force Exch. Serv.**, 13 BRBS 1130 (1981); **Suppa v. Lehigh Valley R.R. Co.**, 13 BRBS 374 (1981). The Employer is liable for medical services for all legitimate consequences of the compensable injury, including the chosen physician's unskillfulness or errors of judgment. **Lindsay v. George Wash. Univ.**, 279 F.2d 819 (D.C. Cir. 1960); **see also Austin v. Johns-Manville Sales Corp.**, 508 F.Supp. 313 (D. Me. 1981).

The employer is liable for all medical expenses which are the **natural and unavoidable result of the work injury**, and not due to an intervening cause. For example, an employer must pay for the treatment of the claimant's myocardial infarction, if the judge finds that it is causally related to a prior work-related injury. **Atlantic Marine v. Bruce**, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981), **aff'g** 12 BRBS 65 (1980).

If the disability results, however, from aggravation of an injury compensable under the Act, incurred while the employee is working for a second covered employer, the second employer is liable for medical expenses due to the "reinjury." **Abbot v. Dillingham Marine & Mfg. Co.**, 14 BRBS 453 (1981), **aff'd mem. sub nom. Willamette Iron & Steel Co. v. Office of Workers Comp. Programs**, 698 F.2d 1235 (1982).

Any injury sustained during the course of a medical examination scheduled at the employer's request for an alleged work-related injury is covered under the Act, because such an injury necessarily arises out of an in the course of employment. **Weber v. Seattle Crescent Container Corp.**, 19 BRBS 146, 148 (1986).

Section 7 does not require than an injury be economically disabling in order for a claimant to be entitled to medical

expenses, but only that the injury be work-related. **Frye v. Potomac Elec. Power Co.**, 21 BRBS 194 (1988); **Ballesteros**, 20 BRBS at 187; **Winston v. Ingalls Shipbuilding**, 16 BRBS 168 (1984).

Treatment is compensable even though it is due only partly for a work-related condition. **Turner**, 16 BRBS at 258. In **Kelley v. Bureau of National Affairs**, 20 BRBS 169, 172 (1988), the Board held that where relevant evidence established that the claimant's psychological condition was occasioned, at least in part, by her work injury, treatment received by the claimant for this condition was compensable under the LHWCA.

The employer must respond to a request for treatment upon learning of the injury, even if it is uncertain as to whether it was work-related. **Rieche v. Tracor Marine**, 16 BRBS 272 (1984). The employee is similarly required to request authorization for treatment, even if he is unaware of the work-relatedness of his illness. **Mattox v. Sun Shipbuilding & Dry Dock Co.**, 15 BRBS 162 (1982).

The Fifth Circuit has held that since an employer has a statutory responsibility to pay the reasonable cost of its employee's medical care, the government is entitled to reimbursement from the employer for any medical services provided to the employee by a Veterans Administration hospital. **United States v. Bender Welding & Mach. Co.**, 558 F.2d 761 (5th Cir. 1977), **rev'g Simmons v. Bender Welding & Mach. Co.**, 3 BRBS 222 (1976) and **Love v. Bender Welding & Mach. Co.**, 3 BRBS 183 (1976). Similarly, the employer must reimburse any hospital association or other organization which has contracted with its employee to provide general medical care. **Contractors, Pac. Naval Air Bases v. Pillsbury**, 105 F.Supp. 772 (N.D. Cal. 1952); **see LaFortez v. I.T.O. Corp.**, 2 BRBS 102 (1975)(employer must pay entire bill if hospital charges flat rate, even if some treatment unrelated to injury).

Moreover, costs incurred for transportation for medical purposes are recoverable under Section 7(a). **Day v. Ship Shape Maintenance Co.**, 16 BRBS 38 (1983). A van with an automatic lift for a quadriplegic, while not an "apparatus," is chargeable to his employer as a reasonable means to provide necessary transportation for medical purposes. **Id.** at 39. Parking fees and tolls incurred while traveling to or attending medical appointments may also be reimbursed. **Castagna v. Sears, Roebuck & Co.**, 4 BRBS 559 (1976), **aff'd mem.**, 589 F.2d 1115 (D.C. Cir. 1978). Under Section 7(b) and (c), the employer bears the burden of establishing that physicians who treated an injured worker were not authorized to provide treatment under the LHWCA. **Roger's Terminal & Shipping Corp. v. Director, OWCP**, 784 F.2d

687, 18 BRBS 79 (CRT)(5th Cir.), **Cert. denied**, 479 U.S. 826 (1986).

Section 7(c)(2) of the 1984 LHWCA provides that when the employer or carrier learns of its employee's injury, either through written notice or as otherwise provided by the LHWCA, it must authorize medical treatment by the employee's chosen physician. Once a claimant has made his initial, free choice of a physician, he may change physicians only upon obtaining prior written approval of the employer, carrier, or deputy commissioner. 33 U.S.C. §907(c)(2); 20 C.F.R. §702.406.

Employer is ordinarily not responsible for the payment of medical benefits if a claimant fails to obtain the required authorization. **Slattery Assocs. v. Lloyd**, 725 F.2d 780, 787, 16 BRBS 44, 53 (CRT)(D.C. Cir. 1984); **Swain v. Bath Iron Works Corp.**, 14 BRBS 657, 664 (1982). Failure to obtain authorization for a change can be excused, however, where the claimant has been effectively refused further medical treatment. **Lloyd**, 725 F.2d at 787, 16 BRBS at 53 (CRT); **Swain**, 14 BRBS at 664; **Washington v. Cooper Stevedoring Co.**, 3 BRBS 474 (1976), **aff'd**, 556 F.2d 268, 6 BRBS 324 (5th Cir. 1977); **Buckhaults v. Shippers Stevedore Co.**, 2 BRBS 277 (1975). (**See** refusal of treatment discussion at Section 7(d).)

Consent to change physicians **shall** be given when the employee's initial free choice was not of a specialist whose services are necessary for, and appropriate to, proper care and treatment. Consent may be given in other cases upon a showing of good cause for change. **Slattery Assocs. v. Lloyd**, 725 F.2d 780, 16 BRBS 44 (CRT)(D.C. Cir. 1984); **Maguire**, 25 BRBS at 301-02; **Swain v. Bath Iron Works Corp.**, 14 BRBS 657 (1982). Section 7(d)(1) details when a claimant who has paid his own medical expenses can be reimbursed by the employer. Section 7(d)(1) of the LHWCA, as amended in 1984, states:

> **An employee is not entitled to reimbursement of money which he paid for medical or other treatment or services unless:**
>
> > **(A) his employer refused or neglected to provide them and the employee has complied with subsection (b) and (c) and the applicable regulations, or**
> >
> > **(B) the nature of the injury required the treatment and services and, although his employer, supervisor, or foreman knew of the injury, he neglected to provide or authorize them.**

33 U.S.C. §971(d)(1).

Prior to the 1984 Amendments, the LHWCA provided that a claimant could not be reimbursed unless he requested authorization for such services and the employer refused to provide them, or, if treatment was required for an injury, the employer, having knowledge of the injury, refused or neglected to provide treatment.

An employee cannot receive reimbursement for medical expenses under this subsection unless he has first requested authorization, prior to obtaining the treatment, except in cases of emergency or refusal/neglect. 20 C.F.R. §702.421; **Shahady v. Atlas Tile & Marble Co.**, 682 F.2d 968 (D.C. Cir. 1982)(**per curiam**), **rev'g** 13 BRBS 1007 (1981), **cert. denied**, 459 U.S. 1146 (1983); **McQuillen v. Horne Bros., Inc.**, 16 BRBS 10 (1983); **Jackson v. Ingalls Shipbuilding Div., Litton Sys.**, 15 BRBS 299 (1983).

Once the employer has refused to provide treatment or to satisfy a claimant's request for treatment, the claimant is released from the obligation of continuing to seek employer's approval. **Pirozzi v. Todd Shipyards Corp.**, 21 BRBS 294 (1988); **Betz**, 14 BRBS at 809. **See generally Lloyd**, 725 F.2d 780, 16 BRBS 44 (CRT). The claimant then need only establish that the treatment subsequently procured on his own initiative was necessary for treatment of the injury, in order to be entitled to such treatment at the employer's expenses. **Rieche**, 16 BRBS at 275; **Beynum**, 14 BRBS at 958.

The employee need not request treatment when such a request would be futile, **Shell v. Teledyne Movable Offshore**, 14 BRBS 585, 590 N.2 (1981), such as when an employer fires its employee because it did not believe the employee's medical complaints. **Mitchell v. Sun Shipbuilding & Dry Dock Co.**, 7 BRBS 215 91977), **aff'd mem. in pert. part**, 588 F.2d 823 (3d Cir. 1978).

If an employer has no knowledge of the injury, it cannot have neglected to provide treatment, and the employee therefore is not entitled to reimbursement for any money spent before notifying the employer. **McQuillen v. Horne Bros., Inc.**, 16 BRBS at 16.

An employer is considered to have knowledge when it knows of the injury and has facts that would lead a reasonable person to conclude that it might be liable for compensation and should investigate further. **Harris v. Sun Shipbuilding & Dry Dock Co.**, 6 BRBS 494 (1977), **rev'd on other grounds sub nom. Aetna Life Ins. Co. v. Harris**, 578 F.2d 52 (3d Cir. 1978).

An employer's physician's statement that the employee is recovered and discharged from treatment may be tantamount to the employer's refusing to provide treatment. **Shahady**, 682 F.2d at 970; **Walker v. AAF Exch. Serv.**, 5 BRBS 500 (1977); **Buckhaults v. Shippers Stevedore Co.**, 2 BRBS 277 (1975), as may be testimony by employer's physicians at the hearing opposing the treatment request, **Atlantic & Gulf Stevedores v. Newman**, 440 F.2d 908 (5th Cir. 1971), a mistaken diagnosis, **Cooper Stevedoring v. Washington**, 556 F.2d 268, 6 BRBS 324 (5th Cir. 1977), **aff'g** 3 BRBS 474 (1976); **Matthews v. Jeffboat, Inc.**, 18 BRBS 185 (1986); **McGuire v. John T. Clark & Son, Inc.**, 14 BRBS 298 (1981), or employer's physician urging that the employee return to work. **Rivera v. National Metal & Steel Corp.**, 16 BRBS 135 (1984).

Where an employer's physician's actions constitute a refusal of treatment, the employee is justified in seeking treatment elsewhere, without the employer's authorization, and is entitled to reimbursement for necessary treatment subsequently procured on his own. **Matthews**, 18 BRBS at 189; **Rivera**, 16 BRBS at 138.

The Board has affirmed a finding that a physician's misdiagnosis and recommendation that the claimant return to work was tantamount to a refusal to treat, thereby excusing the claimant's failure to get the employer's authorization and consent to obtain medical treatment, and the physician's failure to file the required reports with employer. Thus, an award of medical benefits was affirmed. **Matthews**, 18 BRBS at 189.

Where an employer takes no action on a claimant's request to be examined by a physician, the employer has effectively refused or at least neglected to provide treatment or services within the meaning of the LHWCA. **Rogers v. Pal Servs.**, 9 BRBS 807, 801-11 (1978).

For the claim to be valid and enforceable against the employer, the employee's treating physician must furnish the employer and the deputy commissioner, within 10 days following the first treatment, with a report of the injury or treatment on a form prescribed by the Secretary. Such notice must also be provided when the claimant is hospitalized. **Holmes v. Garfield Memorial Hosp.**, 123 F.2d 166 (D.C. Cir. 1941).

The Secretary may excuse the physician's failure to do so if he finds it to be in the interests of justice. 33 U.S.C. §907(d)(2). 20 C.F.R. §402.422 delegates the Secretary's authority to the deputy commissioner and the judge. **See Lloyd**, 725 F.2d at 787, 16 BRBS at 54 (CRT). In **Roger's Terminal**, 784 F.2d at 694, 18 BRBS 87 (CRT), a finding of no prejudice was affirmed.

The **burden of proof** regarding compliance with this requirement is on the employee, and as discussed herein, Claimant has sustained her burden on this issue. **Jenkins**, 594 F.2d at 407, 10 BRBS at 8.

In **Lloyd**, the District of Columbia Circuit stated that a judge may excuse a physician's failure to file a report based on an employer's refusal to provide or authorize treatment but is never required to do so as a matter of law. The court held that the earlier D.C. Circuit case of **Shahady v. Atlas Tile & Marble Co.**, 682 F.2d 968 (D.C. Cir. 1982)(**per curiam**), **cert. denied**, 459 U.S. 1146 (1983), which held that the judge abused his discretion if he did not excuse the failure to file in that situation, was based on a misreading of **Buckhaults**, 2 BRBS 277, in which the Board held merely that such a refusal might be good cause for failure to file. **Lloyd**, 725 F.2d at 787, 16 BRBS at 54-55 (CRT). **See also Nardella v. Campbell Mach.**, 525 F.2d 46, 3 BRBS 78 (9th Cir. 1975); **Reiche**, 16 BRBS at 276 ("An administrative law judge's decision to make such a finding is fully within his discretion."); **Cherry v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 857 (1978)(disability evaluation report not sufficient); **Arnold v. Mast**, 1 BRBS 246 (1974).

Similarly, in **Maguire v. Todd Pacific Shipyards Corp.**, 25 BRBS 299 (1992), the Board found that although the physician, who had taken over treatment of the claimant when the claimant's authorized physician retired, had failed to provide a report to employer within 10 days of the first treatment, the employer had not provided any evidence to suggest that the treatment was unnecessary or unrelated to the claimant's work injury. Thus, the Board concluded that an excusal of the delay was in the interests of justice. **Id.**

In the case at bar, the Employer also submits that Claimant's need for physical therapy on June 9, 1999, almost twenty-three (23) years after her injury, is due solely to her move from her apartment at 4618 Livingston Road, SE, to 4632 Livingston Road, SE, in Washington, D.C. on April 9th of that year, the Employer pointing to that June 9, 1999 physical therapy history report. (EX 6)

Intervening Event

The issue in this case is whether any disability herein is casually related to, and is the natural and unavoidable consequence of, Claimant's work-related accident or whether her April 9, 1999 move several doors down on her same street constituted an independent and intervening event attributable to

Claimant's own intentional or negligent conduct, thus breaking the chain of causality between the work-related injury and any disability he may now be experiencing.

The basic rule of law in "direct and natural consequences" cases is stated in Vol. 1 **Larson's Workmen's Compensation Law** §13.00 at 3-348.91 (1985):

> When the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause [event] attributable to claimant's own intentional conduct.
>
> Professor Larson writes at Section 13.11:
>
> The basic rule is that a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury.
>
> The simplest application of this principle is the rule that all the medical consequences and natural sequelae that flow from the primary injury are compensable . . . The issue in all of these cases is exclusively the medical issue of causal connection between the primary injury and the subsequent medical complications. (**Id**. at §13.11(a))

This rule is succinctly stated in **Cyr v. Crescent Wharf & Warehouse**, 211 F.2d 454, 457 (9th Cir. 1954) as follows: "If an employee who is suffering from a compensable injury sustains an additional injury as a natural result of the primary injury, the two may be said to fuse into one compensable injury." **See also Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mississippi Coast Marine, Inc. v. Bosarge**, 632 F.2d 994 (5th Cir. 981), **modified**, 657 F.2d 665 (5th Cir. 1981); **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981).

Likewise, a state court has held: "We think that in this case the claimant has produced the requisite medical evidence sufficient to establish the causal connection between his present condition and the 1972 injury. The only medical evidence presented on the issue favors the Claimant." **Christensen v. State Accident Insurance Fund**, 27 Or. App. 595, 557 P.2d 48 (1976).

The case at bar is not a situation in which the initial medical condition itself progresses into complications more serious than the original injury, thus rendering the added

complications compensable. **See Andras v. Donovan**, 414 F.2d 241 (5th Cir. 1969). Once the work-connected character of any injury, such as a back injury, has been established, the subsequent progression of that condition remains compensable as long as the worsening is not shown to have been produced by an independent or non-industrial cause. **Hayward v. Parsons Hospital**, 32 A.2d 983, 301 N.Y.S.2d 649 (1960). Moreover, the subsequent disability is compensable even if the triggering episode is some non-employment exertion like raising a window or hanging up a suit, so long as it is clear that the real operative factor is the progression of the compensable injury, associated with an exertion that in itself would not be unreasonable in the circumstances.

However, a different question is presented when the triggering activity is itself rash in the light of claimant's knowledge of his condition. The issue in all such cases is exclusively the medical issue of causal connection between the primary injury and the subsequent medical complications, and denials of compensation in this category have invariably been the result of a conclusion that the requisite medical causal connection did not exist. **Matherly v. State Accident Insurance Fund**, 28 Or. App. 691, 560 P.2d 682 (1977). The case at bar does not involve a situation in which a weakened body member contributed to a later fall or other injury. **See Leonard v. Arnold**, 218 Va. 210, 237 S.E.2d 97 (1977). A weakened member was held to have caused the subsequent compensable injury where there was no evidence of negligence or fault. **J.V. Vozzolo, Inc. v. Britton**, 377 F. 2d 144 (D.C. Cir. 1967); **Carabetta v. Industrial Commission**, 12 Ariz. App. 239, 469 P.2d 473 (1970). However, the subsequent consequences are not compensable when the claimant's negligent intentional act broke the chain of causation. **Sullivan v. B & A Construction, Inc.**, 122 N.Y.S.2d 571, 120 N.E.2d 694 (1954). If a claimant, knowing of certain weaknesses, rashly undertakes activities likely to produce harmful results, the chain of causation is broken by his own negligence. **Johnnie's Produce Co. v. Benedict & Jordan**, 120 So. 2d 12 (Fla. 1960). Nor is this a case involving a subsequent incident on the way to the doctor's office for treatment of the original work-related accident. **Fitzgibbons v. Clarke**, 205 Minn. 235, 285 N.W.2d 528 (1939); **Laines v. WCAB**, 40 Cal. Comp. Cases 365, 48 Cal. App. 3d 872 (1975). The visit to the doctor was based on the statutory obligation of the employer to furnish, and of the employee to submit to, a medical examination. **See Kearney v. Shattuck**, 12 A.D.2d 678, 207 N.Y.S.2d 722 (1960).

The Benefits Review Board reversed an award of benefits to a claimant who had sustained an injury to his left leg, when he fell from the roof of his house after his injured knee collapsed

under him, while attempting to repair his television antenna. Eighteen months earlier this claimant had injured his right knee in a work-related accident, such claimant receiving benefits for his temporary total disability and for a rating of fifteen percent permanent partial disability of the leg. The Board reversed the award for additional compensation resulting from the second injury. **Grumbley v. Eastern Associated Terminals Co.**, 9 BRBS 650 (1979). The Benefits Review Board held, "[U]nder Section 2(2) of the Act, the second injury to be compensable must be related to the original injury. Therefore, if there is an intervening cause or event between the two injuries, the second injury is not compensable. Thus, this Administrative Law Judge must focus on whether the second injury resulted 'naturally or unavoidably.' Therefore, claimant's action must show a degree of due care in regard to his injury." Furthermore, the Board held, "[c]laimant obviously did not take any such precautions, nor did the record show that any emergency situation existed that would relieve claimant from such allegation." **Grumbley**, **supra**, at 652.

This Administrative Law Judge, applying these well-settled legal principles to the case at bar, and based upon the totality of the record, finds and concludes that Claimant's April 9, 1999 move was not an intervening cause which is attributable only to Claimant's own conduct and which broke the chain of causality between Claimant's work-related incident and her present condition. Claimant's actions did exhibit the requisite amount of due care in regard to her previous injury, as further discussed below.

I have set out rather extensively the above summary of the pertinent legal principles to put this claim in proper perspective for the benefit of the parties and reviewing authorities.

While Employer submits (1) that Claimant did not request a change of physicians from Dr. Mills to Dr. Liberman, (2) that she did not have any treatment between 1987 and April 9, 1996, (3) that her doctors failed to file the appropriate reports, (4) that her current condition is not causally related to her injury of over twenty-four (24) years ago and (5) that any physical therapy is neither reasonable nor necessary but simply is palliative, those defenses are rejected for the following reasons:

Claimant properly stopped seeing Dr. Mills early in 1983 (1) because of the complications from the December 21, 1982 epidural injection by (or on behalf of) the doctor recommended by Dr. Mills (CX 3), (2) because Dr. Mills simply referred her back to that doctor but Claimant, for obvious reasons, wanted to have nothing to do with the doctor (who apparently watched as a

female attendant injected 2 ccs of air into her back, according to the Claimant) and (3) because of the intense headaches she experienced for several years.

Claimant then went to see Dr. Liberman, whom she described as “very nice” and someone whom she likes, and I consider him to be her treating neurologist, pursuant to the above well-settled principles of law.

Claimant, moreover, did not have treatment between 1987 and April 9, 1996 for her back and neck solely because the Employer ignored and/or refused her numerous requests for physical therapy Claimant testified credibly before me and, towards the end of her hearing, she was able to provide to counsel for the Employer and this Court a number of letters that she wrote to various claims adjusters at the insurance company, the first letter is dated May 28, 1998 (relating to an MRI recommended by Dr. Liberman) (CX 6) and the most recent letter is dated January 8, 2000. (CX 13) Those letters, in evidence as CX 7 - CX 13, all deal with Claimant’s requests for physical therapy, which requests were consistently ignored and/or refused by the Employer and its Carrier.

Claimant testified that in all of the years she has been dealing with the Carrier for her September 2, 1976 injury, she has received just this one letter from them dated August 9, 1999 (CX 1):

> This is in response to your 7/31/99 letter. All information discussed at that time was what information that I had in the file. We have not paid any bills to the hospital since 8/97 and Dr. Liberman since 11/96. Again, we can not authorize any treatment until I receive medical notes from Dr. Liberman. It is your responsibility to contact the doctor’s office and have them to contact my office to resolve this matter. Secondly, I gave you the last address we had in the system, which was Cindy Lane. Otherwise, how would I have know that being as though I just took over your file in 2/99. (sic)
>
> Should you have any further questions or concerns, you can reach me at the office from 7:30 am to 3:30 pm. I look forward to hearing from you in the future.

As the Employer has consistently ignored and/or ignored Claimant’s requests for physical therapy, her doctors are excused for any failure to file timely the physician’s reports as such would be futile and a waste of everyone’s time based upon the Carrier’s position herein.

With reference to the causality issue, I have given greater weight to the well-reasoned and well-documented opinions of Dr. Mills and Dr. Liberman as they are Claimant's treating physicians, have been seeing Claimant for many years and as their opinions are entitled to greater weight. In this regard, **see Pietrunti, supra** and **Amos, supra**.

Claimant is entitled to the Section 20(a) presumption on this Section 7 issue and the reports of Dr. Cohen and Dr. Dennis do not rebut the statutory presumption in Claimant's favor for the following reasons.

Initially, I note that the March 26, 1985 report of Dr. Dennis is before the effective date of the settlement and is irrelevant with reference to a need for medical care in 1999. Moreover, the October 2, 2000 report of Dr. Dennis, while more contemporaneous, states, "**It would certainly not be unreasonable to treat the patient with episodic physical therapy**" but that the doctor could not relate "the patient's subjective complaints to the injury sustained in 1976" because "**the medical records that (the doctor has) are simply not sufficient enough to establish a relationship between the 1976 injury and her current complaints**." (Emphasis added)(EX 2 at 2-3) Thus, it is apparent that the doctor did not review all of Claimant's medical records since 1976 so that he would have been able to read about the flareups of low back pain in the interim.

Furthermore, the November 3, 2000 report of Dr. Cohen is internally inconsistent and contradictory because the doctor states on page 3 of EX 7 (Emphasis added):

> **Her pain complaints are completely subjective and not supported by her objective findings. Her x-rays are consistent with pre-existing multiple level degenerative disc disease especially of the cervical spine.**

Dr. Cohen further opined that Claimant had recovered from her slip and fall and was no longer in need of physical therapy.

Thus, as the doctor's report is internally inconsistent and contradictory, I have given little weight to that report because it ignores the fact that Claimant's periodic flareups of law back pain result from aggravations of such pre-existing disc disease.

Moreover, the cases cited and the arguments made by Employer's counsel in her post-hearing brief (EX 13) are distinguishable and are rejected herein as I have given greater weight to the well-reasoned and well-documented opinions of Dr. Mills and Dr. Liberman.

Accordingly, in view of the foregoing, I find and conclude that the physical therapy modalities, prescribed by Dr. Liberman in his two reports of 1996 (EX 5) are reasonable and necessary and are causally related to Claimant's September 2, 1976 injury.

As noted above, Claimant's move several apartments down her street did not sever the chain of causality between her September 2, 1976 injury and her need for physical therapy on June 9, 1999. As the Employer had denied her medical treatment for several years, Claimant had to depend on Medicaid to pay for her three courses of physical therapy in 1999. Those bills, however, are the Employer's responsibility and Medicaid should be reimbursed therefor.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order.

It is therefore **ORDERED** that:

1. The self-insured Employer shall furnish such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injury referenced herein may require, including authorization of and payment for the physical therapy and other modalities recommended by Dr. Liberman, subject to the provisions of Section 7 of the Act.

A
DAVID W. DI NARDI
Administrative Law Judge

Boston, Massachusetts
DWD:jl